

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Michael L. Jones, # 237769,

Plaintiff,

vs.

Warden Michael McCall, *SCDC Perry CI*;
Associate Warden Claytor, *SCDC Perry CI*;
Major Denis Bush, *SCDC Perry CI*;
Captain Miller, *SCDC Perry CI*;
Lt. Tamara Conwell, *SCDC Perry CI*;
Lt. Harouff, *SCDC Perry CI*;
Dr. Benjamin Lewis, *Perry CI*;
Nurse Practitioner III Amy Enloe, *SCDC Perry CI*;
LPN Cathy Jones, *Perry CI*;
LPN Tipen, *Perry CI*;
RN Adetoro Sobwale, *Perry CI*;
RN Soloan, *Perry CI*;
Warden Stevenson III, *BRCI*;
Dr. Donald Samson, *BRCI*;
LPN Geneva Walters, *BRCI*; individual and official
capacities,

Defendants.

) **C/A No. 8:10-0015-JFA-BHH**

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) Report and Recommendation
for

) Dismissal of Unserved Defendant

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Background of this Case

This is a civil action filed by a prisoner confined at a local detention facility. Under Local Rule 73.02(B)(2), pretrial proceedings in this action have been referred to the undersigned United States Magistrate Judge. In an order filed in this case on January 27, 2010, the undersigned authorized service of process upon the defendants. Counsel of

record has entered an appearance on behalf of all but one of the defendants. On June 25, 2010, the United States Marshal submitted a summons "returned unexecuted" (Entry No. 43) for LPN Tipen.

In an order (Entry No. 47) filed in this case on July 6, 2010, the undersigned apprised the plaintiff of Rule 4(m) of the Federal Rules of Civil Procedure. Rule 4(m) of the Federal Rules of Civil Procedure provides that unless a defendant is served within 120 days after the complaint is filed, this court is required to dismiss an action *without prejudice* as to that particular defendant. Case law interpreting Rule 4(m) or its predecessor, "old" Rule 4(j), has uniformly held that dismissal is mandatory unless good cause is shown if a defendant is not served within 120 days. See, e.g., *Mendez v. Elliott*, 45 F.3d 75, 78-80 (4th Cir. 1995) (collecting cases); *Epstein v. White*, No. 90 C 4641, 1991 U.S. Dist. LEXIS 14888, 1991 WL 214152 (N.D. Ill., Oct. 18, 1991), *reconsideration denied*, *Epstein v. Frye*, 1992 U.S. Dist. LEXIS 13574, 1992 WL 225566 (N.D. Ill., Sept. 8, 1992); and *cf. Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297 (7th Cir. 1991).

Hence, in the order (Entry No. 47) filed on July 6, 2010, the undersigned directed the plaintiff, within twenty-one (21) days, to submit a new Form USM-285 and summons for LPN Tipen. On July 6, 2010, the Office of the Clerk of Court mailed a copy of the order, a Form USM-285, and a summons to the plaintiff. The deadline for plaintiff to submit a new Form USM-285 and summons has passed. No response to the order of July 6, 2010, has been received from the plaintiff.

Recommendation

Accordingly, it is recommended that the District Court dismiss LPN Tipen from this case *without prejudice* pursuant to Rule 4(m) for failure of service. The parties' attention is directed to the Notice on the next page.¹

s/Bruce Howe Hendricks
United States Magistrate Judge

August 16, 2010
Greenville, South Carolina

¹The Federal Station Post Office on the first floor of the United States Courthouse in Greenville, South Carolina, will permanently close on September 4, 2010. Hence, correspondence addressed to the Clerk's Office in Greenville should now be sent to Clerk's Office, United States District Court, 300 East Washington Street — Suite 239, Greenville, South Carolina 29601.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

**Larry W. Propes, Clerk of Court
United States District Court
300 East Washington Street — Suite 239
Greenville, South Carolina 29601**

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).